IN THE HIGH COURT OF UTTARANCHAL AT NAINITAL

Writ Petition No.749 (M/B) of 2006

Vinayendra Nath Upadhyaya,
S/o Late Gorakh Nath Upadhyaya,
R/o Village Saryan Post Kornta Deeh,
District Ballia through power of attorney holder,
Chandra Prakash Upadhyaya, S/o
Late Jyoti Prakash Upadhyaya, R/o Village Saryan,
Post Kornta Deeh, District Ballia

….. **Petitioner**

Vs

1. Union of India through Secretary Ministry of Shipping, Road Transport & Highways, New Delhi
2. State of Uttaranchal through Secretary PWD, Dehradun
3. Chief Engineer, National Highways, PWD Dehradun, Uttaranchal
4. Aayukt, Garhwal Mandal, Pauri Uttaranchal
5. Adhishashi Abhiyanta, Rashtriya Marg Khand, Lok Nirman Vibhag, Roorkee, District Hardwar
6. Rajendra Goyal, Adhishashi Abhiyanta, Rashtriya Marg Khand, Lok Nirman Bibhag, Roorkee, District Hardwar
7. M/s Chaudhary Traders, 35 Civil Lines, Roorkee, Dehradun, through Attorney/Authorized Representative Sri Madhukar Sharma

……Respondents

Sri W.H. Khan, Advocate for the petitioner
Sri Arvind Vashisth, Assl. Solicitor General for Union of India
Sri K.P. Upadhyaya, ld. standing counsel for State of Uttaranchal
Sri Sharad Sharma, ld. counsel for Respondent No.7.

Dated: - August 7, 2006

Coram: Hon'ble P.C.Verma,J.
Hon'ble B.S. Verma,J.

By means of this writ petition, the petitioner has prayed for writ of certiorari quashing the order dated 16.6.2006, contained in Annexure No.9 to the writ petition passed by Respondent No.4 on the ground that the petitioner was wrongly excluded from participating in the auction bid which was scheduled to be held on 30.5.2006.

2. According to the learned counsel for the petitioner, the petitioner had submitted the application alongwith envelope mentioning therein the first offer and other relevant documents for participating in the bid. The documents were scrutinized of all the applicants and vide notice dated 29.5.2006, the names of the candidates were published who were found eligible to participate in the public auction to be held on 30.5.2006. It is evident from the order dated 1.6.2006 that the petitioner was not allowed to participate in the auction proceedings on the ground that when before the auction committee, the envelope of the petitioner was opened on 30.5.2006, it was blank and it did not contain any offer.

3. Learned counsel for the petitioner submits that it is wrong to say on the part of the respondents that there was no offer in the sealed envelope submitted by the petitioner. The learned counsel for the petitioner also submitted that when the petitioner tried to submit the photocopy of the said first offer which was not found in the envelope, the same was not accepted. He further submitted that at the time of auction, the petitioner by application in writing, had submitted his offer which were much more than offers of the other contractors and his highest offer was Rs. 1,10,00,000/- while the highest offer of Respondent No.7 is Rs.1,07,60,000/-. There is marginal difference of Rs.3,40,000/-.

4. Since the petitioner's envelope was found blank, therefore, the application of the petitioner was not in accordance with condition 10 of tender notice and he was rightly excluded from participating in the auction. The sealed envelope has been brought on record by the respondents as Annexure CA-1 to the counter affidavit. There is a note on the envelope itself that the

sealed envelope was opened and the first offer was not found in the envelope. It has been duly signed by the concerned officials i.e. in-charge Assistant Engineer, Executive Engineer, representative of the revenue department (Naib Tehsildar, Roorkee, Divisional Account Officer and concerned Incharge Toll Clerk). The signatures of these aforesaid persons shows that the aforementioned persons were present when the envelope was opened and after opening the same, no envelope was found in it, therefore, there is sufficient evidence to establish that the envelope was blank and nothing was found therein. Therefore, the application of the petitioner did not fulfill the requirement contained in condition 10 of the tender notice. Hence, the decision of the respondents not to allow the petitioner to participate in the auction was rightly and the petitioner was rightly been excluded.

5. Learned counsel for the petitioner next contended that the condition is directory in nature and when at the time of auction, he supplied the second copy, there was sufficient compliance of the said condition No. 10 of the tender notice. It is settled law that the time is essence of contract. Tender notice prescribes the time and last date for receipt of application duly fulfilled by the applicant and fulfilling all the conditions of the tender notice. Therefore, this condition of the tender notice cannot be said to be directory in nature and subsequent supply of the copy was after the time when it was over, hence it was rightly not accepted.

6. Learned counsel for the petitioner laid emphasis on the judgment of Apex Court in the case of *"New Horizons Ltd. and another Vs. Union of India and others, (1995) 1 S.C.C. 478th on the following lines: -*

"Terms and conditions of the tender should be construed from the standpoint of a prudent businessman- Terms of the offer of the tenderer should be first considered and if found suitable then only its credentials and ability to perform the work should be considered from a practical point of view."

7. We are unable to understand how this observation made by the Apex Court helps the petitioner rather it goes against the petitioner as here according to the condition No. 10 of the tender notice, the petitioner had to submit the first offer which he failed and did not submit. Therefore, the aforesaid paragraph supports our view that the petitioner was rightly excluded from participating in the auction bid.

8. Learned counsel for the petitioner then relied on the Apex Court judgment in the case of *"State of West Bengal Vs. M.R. Mondal and another, (2001) 8 S.C.C. 443"* and relied on para-17. The relevant portion of Para-17 is being reproduced as under: -

> ***"Unlike contracts entered into in exercise of the executive power of the State, wherein terms can be stipulated and settled at the will and pleasure of the State, a franchise or contract envisaged for the collection of toll in question is limited and circumscribed by the provision of the Fee Collection Rules, 1997 and what could only be the subject-matter of an auction, selection and grant on the basis of competitive rates of the bid cannot be the subject of whim and fancy of any authority, particularly when public interest and public exchequer of the Central Government is and will be at stake."***

9. There is no quarrel so far as the holding of the bid is concerned. Rule 5 of the National Highways (Fees for the use of National Highways Section & Permanent

Bridge-Public Funded Project) Rules, 1997 provides that all fees levied under these rules shall be collected by the executing agency concerned departmentally or through private contractors on the basis of **competitive bidding on behalf of the Central Government.** Learned counsel for the petitioner further submitted that the condition No.10 of the tender notice is in violation of Rule 5 of the aforesaid Rules as the asking for first offer in the sealed envelope changed the character of public auction into tender-cum-auction which is not permissible.

10. Learned counsel for the petitioner is misconceived. From a perusal of the whole tender notice, it does not come out that the department has adopted the tender-cum-auction procedure. What was required by condition No.10 was that the first offer of the petitioner should have been sent alongwith the form in a sealed envelope. It was to be taken as first offer in the auction bid and apart from that the candidate had to offer in the auction proceedings. It was an attempt to settle the contract in case of failure of public auction on the basis of that offer which was required to be sent in the sealed envelope. Therefore, it cannot be said that it was a procedure tender-cum-auction and it is clear that the procedure adopted by the respondents was completely the procedure by public auction.

11. Learned counsel for the petitioner lastly challenged the proceedings concluded in the favour of Respondent No.7 on the ground that the approval of the highest bid of the Respondent No.7 was arbitrary and illegal in as much as Respondent No.7 did not comply condition No.19 of the tender notice.

12. Condition No.19 of the tender notice provides that the highest bidder shall deposit 1/4th of the highest bid money within 7 days from the date of auction when the proceedings were over. It is evident from Annexure No.8 to the writ petition which is a letter written by Executive Engineer to the Commissioner, Garhwal Region, Pauri Garhwal for approval of the bid that the petitioner has deposited 1/4th of 1,07,60,000/-, the details of which are as under: -

1.	FDR No.812710 dated 1.6.2006	Rs. 7,50,000/-
2.	FDR No.6914851 dated 1.6.2006	Rs 5,00,000/-
3.	Amount of security which was deposited with the papers relating to the auction	Rs. 10,00,000/-
	Total	Rs.22,50,000/-

13. We have calculated 1/4th of the highest auction bid money of Rs. 1,07,60,000/- which comes to Rs.26,90,000/- while only a sum of Rs.22,50,000/- was deposited within the stipulated time i.e. one week. Therefore, the Respondent No.7 did not deposit 1/4th of the amount as required by condition No.19 of the tender notice. Learned counsel for Respondent No.7 Sri Sharad Sharma invited our attention to the averments made in para-9 of his counter affidavit filed by the State and paragraph No.14 of the counter affidavit filed by Respondent No.7 and submitted that since the bid was for a period of one year, therefore as per condition 17 of the tender notice, the highest bid was to be offered at the rate of per year, therefore, this bid was for whole of the year and since the bid was belated for 2 months, therefore excluding two months from the period of one year, the bid money is proportionately lowered and accordingly a sum of Rs.22,50,000/- was deposited.

14. This argument of learned counsel for Respondent No.7 is misconceived. The work of collection of toll was to start from 1.7.2006 and was to end on 30.06.2007 as the auction for the year 2006-07. The rate mentioned in condition No.17 of the auction notice is general in nature while condition 1 of the tender notice says that the auction shall be from the taking over of the charge for collection till 31.03.2007. Therefore, knowingly that the petitioner will get lesser period as the auction itself was being held in May, he offered the highest bid. Condition No. 19 is more clear that whatever the highest bid, 1/4th of the same has to be deposited within a period of one week, Since, the Respondent No.7 did not deposit the 1/4th of the amount of auction bid money within the stipulated period, the approval of the Commissioner was bad in law and being arbitrary apart.

15. Learned counsel for the petitioner relied on the judgments rendered by Apex Court in the case of *"Balram S/o Bhasa Ram Vs. Ilam Singh and others (1996) 5 SCC 705" and in the case of "Rao Mahmood Khan Vs. Ranibir Singh and others, AIR 1995 SC 2195"* wherein the requirement to deposit 1/4tth of bid amount has been held to be mandatory for the reason that on account of that failure, the security shall stand forfeited and the auction shall stand cancelled. Here, the condition No.19 is also similar to those conditions in the aforesaid judgments wherein the Hon'ble Apex Court has held the auction to be nullity. Therefore, we allow the writ petition on the point that the acceptance of the bid of Respondent No.7 was contrary to the condition No.19 of the tender notice, as 1/4th of bid amount which comes to Rs.26,90,000/- was not deposited within time. The Commissioner ought to have forfeited the security and ought to have cancelled

the auction and ought to have proceeded further for taking action.

16. Learned counsel for Respondent No.7 submitted that this Court cannot interfere now as the contract stands concluded and the lease deed has been executed on 7.7.2006 and submitted that the same can be cancelled only in civil suit. He relied on *Radhakrishna Agarwal Vs. State of Bihar, AIR 1977 S.C. 1496.* In the case of **Radha Krishna Agarwal (Supra)**, it was a contract and not the executive power, which was regulated by the Constitution which governed the relation of the parties on the facts apparent in the instant cases for entering into the question of alleged breach of contract. Hence, it was held that no writ or order could be issued under Article 226 of Constitution of India in such a cases to compel the authorities to remedy of breach of contracts pure and simple.

17. Here in the instant case, there is no breach of contract rather it is grant of contract to a person in violation of terms and conditions of the auction notice by not complying the condition No.19 of the tender notice. Therefore, what is under challenge is the decision making process and not the decision itself.

18. In the case of *Tata Cellular Vs. Union of India (1994) 6 SCC 651,* now, it has been settled by the Hon'ble Apex Court that this Court in exercise of powers under Article 226 of Constitution of India **cannot** interfere in the decision but certainly a judicial review of decision making process can be done even after the decision. On judicial review, we have found that the approval by the Commissioner was illegal and illegality cannot be allowed to perpetuate by mereby executing the lease.

19. For the reasons recorded above, we set aside the order dated 16.6.2006 passed by Respondent No.4 and cancel the contract granted to Respondent No.7. The respondents are directed to proceed in accordance with law afresh. Further, the department shall take over the collection of toll in its hand and continue to collect it till the fresh settlement by fresh auction is not held.

20. The writ petition is allowed accordingly, No order as to costs.

(B.S. Verma, J.) **(P.C. Verma, J.)**

Rajeev Dang